IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL REVISION APPLICATION No.264 of 1998
Kapal Mehra ..Applicant.

Vs.

Indusind Enterprises & Finance
Ltd & Anr. ..Respondents.

ALONGWITH

CRIMINAL REVISION APPLICATION No.244 of 1998

Kapal Mehra ..Applicant.

Vs.

Indusind Enterprises & Finance Ltd
& Anr. ..Respondents.

ALONGWITH

CRIMINAL REVISION APPLICATION No.265 of 1998

Kapal Mehra. ..Applicant.

Vs.

Indusind Enterprises & Finance Ltd.
& Anr. ..Respondents.

Mr A. V. Doijode, Advocate for the applicant.

Ms. V. D. Jaisingh for the respondent no.1.

Mr. Y.S. Shinde, APP for the Respondent No.2.

CORAM: V.C. DAGA,J.
DATED: 3RD JULY, 2007.

JUDGMENT:

1. The applicants in all these three revision applications preferred under Sections 397 read with Section 482 of the Code of Criminal Procedure, 1973 ("the Code" for short) are the original accused no.3 in Cr.Case Nos.1019/S/1997 to 1021/S/1997 pending in the Court of Additional Chief Metropolitan

Magistrate, 40th Court, Greater Mumbai ("the Trial Court") filed by the respondent no.1 - original complainant for the offence punishable under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 ("the N.I.Act" for short).

2. Considering the points involved in the three revision applications, on consensus, these revision applications have been heard together and are being disposed of by this common judgment.

THE FACTS:

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3. Case of the original respondent - complainant M/s. Indusind Enterprises and Finance Limited, is that on the request of the accused, it had discounted Bill of Exchange and that the accused had agreed to pay the entire amount representing the value of the discounted bills, in all cases, by 25.11.1996.

4. The accused No.2, authorized signatory of the cheque for and on behalf of M/s. Atsh Industries Ltd., Mumbai, issued three cheques all dated 25.11.1996 for Rs. 16,50,000/- each being the amount due and payable by the accused no. 1 company towards the amount of bill discounted.

5. The complainant deposited all the three cheques with its bankers for encashment. That the said cheques were dishonoured with the remarks "refer to drawer".

6. The complainant thereafter issued notices and called upon all the accused persons to pay the amount of the dishonoured cheques. The notices were accepted by all the accused persons. The same were acknowledged by them but none of them discharged their legal obligation; that is how they failed to comply with the notices issued by the complainant which ultimately resulted in filing complaints under Section 138 read with Section 141 of the N.I.Act against the company, authorized signatory of the cheques (accused no.2) and all other Directors (accused Nos. 3 to 8) of the accused no.1 company which came to be registered as detailed hereinabove.

7. The learned Metropolitan Magistrate after receipt of the complaints, after recording verification in each complaint issued separate process against all the accused persons.

8. The original accused no.3, Kapal Mehra (applicant herein) on service of the process filed application to drop the proceedings against him, contending that there are no averments as required under Section 141 of the N.I.Act to implicate him either in the complaint or in the verification recorded by the learned Magistrate. Reliance was placed on three judgments namely, **1994 Mh.L.J 677 Rajan vs. Gere Corderio, 1998 Cr.L.J, 8 and 1991 Cr.LJ 609**. However, learned Magistrate vide its order dated 4.8.1998 rejected the applications in all three cases.

9. The applicant not being satisfied with the aforesaid orders invoked the revisional jurisdiction of this Court to assail the order on more than one ground. However, the applicant has restricted his submission to the solitary ground reproduced hereinbelow.

SUBMISSIONS:
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10. Learned counsel appearing for the applicant submits that Section 141 of the N.I.Act is a deeming provision. It says that "every person who at the time the offence was committed....." but nowhere it says that every Director is responsible. In his submission a

person could include any person, whether Director or otherwise, who is incharge of and responsible for the conduct the said company but by no means every Director of a company is included. Every Director cannot be prosecuted for the alleged offence under Section 138 of the N.I.Act. That the entire Board of Director is not responsible for the alleged offence.

11. According to the learned counsel, it is open for the learned Magistrate issuing process to use provision of Section 202 of the Cr.P.C. to enquire into the matter as to the nature of the offence concerned, to avoid the prosecution against the innocent person. In his submission, so far as vicarious liability under Section 141 of the N.I.Act is concerned, a person should be incharge of a company and also responsible to the company for it's conduct of the business. Unless both these conditions are fulfilled one cannot be tried under Section 141 of the Act read with Section 138 thereof.

12. Learned counsel for the applicant while placing reliance on the judgment of the Hon'ble Supreme Court in the case of **M/s.Pepsi Foods Ltd and another vs. Special Judicial**

Magistrate and others, 1998 Cr.L.J.1, contends that the Magistrate has to examine the nature of allegations made in the complaint and the evidence, both oral or documentary, in support thereof,he must apply his mind to consider whether or not the allegations made and evidence brought on record would be sufficient for the complainant to succeed to bring the charge home against the accused. That the Magistrate himself can also put questions to the complainant and his witnesses to elucidate answers to find truthfulness of the allegations made in the complaint.

13. Learned counsel for the complainant after laying down the aforesaid foundation drew my attention to the averments made in the complaint reproduced herein below:-

> "The accused no.2 to 8 are the Directors of the accused no.1 Company and accused no.3, the signatory of the cheque. As such, the accused No.2 to 8 are therefore responsible for the conduct of the business of the accused no.1 Company and shall be deemed to be committed an offence u/s. 138 read with Section 141 of the Negotiable Instruments Act as amended." According to the complainant,

all the accused had committed the offence punishable under the provisions of the N.I.Act."

14. The learned counsel for the applicant after disclosing the above averments submit that the word "as such" does not attribute any criminal liability to the present applicant accused or for that purpose other accused persons i.e. including accused Nos.3 to 8, except that they were incharge and responsible for affairs of the company. He submits that there are no clear cut averments of the fact that the Directors were really incharge of the affairs of the company as required under Section 141 of the N. I. Act. In his submission, the words "as such" indicate that the complainant has merely presumed that the Directors of the company must be guilty because they are holding a particular office. This argument did not find favour with the learned Magistrate. He, thus, submits that the learned Magistrate committed serious error of law with regard to the burden to be discharged by the accused. In order to buttress his submissions, learned counsel for the applicant relied upon the judgment in the case of **Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi, 1983 (1) SCC 1**.

15. While developing the argument, learned counsel for the applicant has taken me through the various decisions including the decisions referred hereinabove. According to him, there is no averment or allegation either in the notice or in the complaint or even in the verification recorded by the learned Magistrate that the petitioner was actively involved in day to day business or that he was incharge of the business of the company. Directorship by itself would not make him vicariously liable for any criminal wrong.

16. The learned Magistrate, while issuing process, has to consider facts stated on oath by the original complainant while verifying contents of the complaint. Firstly, according to him, learned Magistrate ought not to have issued process against the petitioner in the absence of categorical statement or any other relevant convincing, prima facie; evidence leading to the involvement of the applicant-original accused no.3. He further submits that the learned Magistrate ought to have given second look when the application for discharge was moved. He, thus, submits that the impugned order refusing to discharge the applicant is unsustainable in the eye of law

and liable to be quashed and set aside.

17. Per contra, learned counsel appearing for the original complainant tried to support the order and urged that the exact words of Section 141(1) need not be incorporated in the complaint as magic word. In her submission, complaint, as a whole, is required to be looked into and then one has to examine whether the averments made are sufficient to issue process. She also took me through some of the provisions of the Companies Act to contend that the Director of the Company is supposed to be incharge of the affairs of the company. She further submits that the view taken by the Court below is a reasonable and possible view and it should not be disturbed in exercise of revisional jurisdiction. Lastly, alternate submission is advanced that, if at all, this Court decides to quash the process against the applicant, in that event, option should be left open with the trial Magistrate that, if he finds on the basis of the evidence led during the trial that the applicant at relevant time was incharge and responsible for the conduct of business of the company,he should be allowed to proceed against him.

CONSIDERATION:-

18. Having heard rival parties and having seen the pleadings in the complaint, no specific allegations have been made against the applicant except the bare statement in para 11 that the accused no.2 to 8 are the Directors of the accused no.1-company and accused no.3 is the authorized signatory of the cheques. As such, accused no. 2 to 8 are therefore responsible for the conduct of the business of accused no.1 and it shall be deemed that they have committed offence under Section 138 read with Section 141 of the N. I. Act (as amended). Section 141 of the N. I. Act pertains to the vicarious liability. Every Director of the company is not necessarily incharge of the Company and not responsible for conduct of the business of the Company. Section 141 is a deeming provision. Merely because a person is director of Company, he is responsible for the conduct of the business of the company as held by the Apex Court in the case of **Sarojkumar Poddar vs. State (NCT of Delhi) & Anr, 2007 AIR SCW 656.**

19. While analysing Section 141 of the N. I. Act, it can be seen that it operates, in

cases where an offence under Section 138 of the N.I. Act is committed by a company. The key words which occur in the Section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words "who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence etc." What is required is that, the persons who are sought to be made criminally liable under Section 141 should at the time the offence was committed,must be in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will only be liable for criminal action. It follows from this, that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The

liability arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affair of a Company and not on designation or status which he holds in the company.

20. A reference to sub-section (2) of Section 141 fortifies the above reasoning because sub-section (2) envisages direct involvement of any Director, Manager, Secretary or other officer of a company in commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these officers in a company. In such cases, such persons are to be held liable. Provision has been made for Directors, Managers, Secretaries and other officers of a company to cover them in cases in their proved involvement.

21. The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within the fold of Section 141 of the Act the complaint must disclose the necessary facts which make a person liable for prosecution.

22. In **State of Haryana v. Brij Lal Mittal and others 1998(5) SCC 343,** it was held that vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises; if at the material time he was in charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of a company, it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without being a director a person can be in charge of and responsible to the company for the conduct of its business.

23. **K.P.G. Nair v. Jindal Menthol India Ltd. 2001 (10) SCC 218** was a case under the Negotiable Instruments Act. It was found that

the allegations in the complaint did not by express words or with reference to the allegations contained therein make out a case that at the time of commission of the offence, the appellant was in charge of and was responsible to the company for the conduct of its business. It was held that requirement of Section 141 was not met and the complaint against the accused was quashed. Similar was the position in **Katta Sujatha v. Fertilizers & Chemicals Travancore Ltd. and another [2002 (7) SCC 655].** This was a case of a partnership. It was found that no allegations were contained in the complaint regarding the fact that the accused was a partner in charge of and was responsible to the firm for the conduct of business of the firm nor was there any allegation that the offence was made with the consent and connivance or that it was attributable to any neglect on the part of the accused. It was held that no case was made out against the accused who was a partner and the complaint was quashed. The latest in the line is the judgment of this Court in **Monaben Ketanbhai Shah and another v. State of Gujarat and others [2004 (7) SCC 15].** It was observed as under:

" It is not necessary to reproduce the language of Section 141 verbatim in the

complaint since the complaint is required to be read as a whole. If the substance of the allegations made in the complainant fulfil the requirements of Section 141, the complaint has to proceed and is required to be tried with. It is also true that in constructing a complaint a hyper technical approach should not be adopted so as to quash the same. The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind. These provisions create a statutory presumption of dishonesty, exposing a person to criminal liability if payment is not made within the statutory period even after issue of notice. It is also true that the power of quashing is required to be exercised very sparingly and where, read as a whole, factual foundation for the offence has been laid in the complaint,it should not be quashed. All the same, it is also to be remembered that it is the duty of the court to discharge the accused if taking everything stated in the complaint as correct and construing the allegations made therein liberally in favour of the complainant, the ingredients of the offence are altogether lacking. The present case falls in this category as would be evident from the facts noticed hereinafter."

It was further observed:

"6...The criminal liability has been fastened on those who, at the time of the commission of the offence, were in charge of and were responsible to the firm for the conduct of the business of the firm. These may be sleeping partners who are not required to take any part in the business of the firm; they may be ladies and others who may not know anything about the business of the firm. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove

> that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and establishes that fact. The present case is of total absence of requisite averments in the complaint."

24. Now, turning to the complaints in hand and the averments made in the pleadings referred to hereinabove indicate that the complainant has merely presumed that the accused no.3 being the Director of the company must be responsible for the conduct of the business of the company. There is not even a whisper nor shred of evidence, apart from presumption drawn in the complaint that there is any act committed by the accused no.3-Director from which reasonable inference can be drawn that he is vicariously liable. In the circumstances, therefore, I am in complete agreement with the argument of the learned counsel for the applicant that no case against the applicant-accused no.3 has been made out expressly on the allegations made in the complaint. Proceedings, therefore, against him are liable to be quashed and set aside.

25. A magistrate issuing process is expected to act meticulously and examine the averments

made in the complaint and verification of statement in such or similar cases more carefully, when the prosecution is under special legislation. It is true that the evidence is not required to be pleaded but there has to be a basic averment as to how one is involved in the alleged crime.

26. This aspect of the matter has also been considered recently by the Apex Court in the case of **Sabitha Ramamurthy & Anr v. R.B.S. Channabasavaradhya, 2006 (9) Scale 212]** stating:

> "...Section 141 raises a legal fiction. By reason of the said provision, a person although is not personally liable for commission of such an offence would be vicariously liable therefor. Such vicarious liability can be inferred so far as a company registered or incorporated under the Companies Act, 1956 is concerned only if the requisite statements, which are required to be averred in the complaint petition, are made so as to make the accused therein vicariously liable for the offence committed by the company. Before a person can be made vicariously liable, strict compliance of the statutory requirements would be insisted.."

27. Although, I uphold the order of the Court below, I would like to state that there are ample provisions in the Code of Criminal Procedure, 1973 in which the Court can take cognizance against persons who have not been made accused and try them in the same manner

along with the other accused. In the old Code, Section 351 contained a lacuna in the mode of taking cognizance if a new person has to be added as an accused. The Law Commission in its 41st Report (para 24.81) adverted to this aspect of the law and Section 319 of the present Code gave full effect to the recommendation of the Law Commission by removing the lacuna which was found to exist in Section 351 of the old Code. Section 319, as incorporated in the present Code, may be extracted thus:

> 319. Power to proceed against other persons appearing to be guilty of offence:-
>
> (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.
>
> (2) Where such person is attending the Court, he may be arrested or summoned, as the circumstances of the case may require for the purpose aforesaid.
>
> (3) Any person attending the Court, although not under arrest or upon a summons, they be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.
>
> (4) Where the Court proceeds against any person under sub-section (1) then --

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the Inquiry or trial was commenced."

28. This provision gives ample powers to any court to take cognizance and add any person not being an accused before it and try him along with the other accused. This provision was also the subject-matter of a decision by the Apex Court in **Joginder Singh v. State** of Punjab where Tulzapurkar : J speaking for the Court observed thus: (SCC para 6, p. 349: SCC (Cri) 2991).

> "A plain reading of Section 319 (1), which occurs in Chapter XXIV dealing with general provisions as to inquiries and trials, clearly shows that it applies to all the Courts including a Sessions Court and as such a Sessions Court will have the power to add any person, not being the accused before it, but against whom there appears during trial sufficient evidence indicating his involvement in the offence, as an accused and direct him to be tried along with the other accused..."

29. In the above circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the Court that the other accused or those who have not been

arrayed as accused against whom proceedings have been quashed have also committed the offence the Court can take cognizance against them and try them along with the other accused. But, I would hasten to add that this is really an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken. More than this, I would not like to say anything further at this stage. I leave the entire matter to the discretion of the court concerned so that it may act according to law; I would, however, make it plain that the mere fact that the proceedings have been quashed against petitioner (accused no.3) will not prevent the Court from exercising its discretion if it is fully satisfied that a case for taking cognizance against him has been made out on the additional evidence led before it.

30. For the above reasons, I allow all these revision applications only to the extent that the order of the learned Magistrate refusing to quash the proceedings against or discharge the applicant/accused no.3 is hereby quashed and set aside and the trial can proceed

against the rest of the accused persons.

31. The trial court is directed to dispose of the trial, as expeditiously as possible, at any rate, within six months from the date of the receipt of the copy of this order.

32. All rival contentions are kept open.

33. All three revision applications are disposed of accordingly.

(V.C. DAGA,J.)